

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Eure Family Limited Partnership)	File No. EB-01-NF-201
)	
Owner of Antenna Structure)	NAL/Acct. No. 200132640006
Registration # 1018162)	
Mathews County, Virginia)	FRN 0005-0271-72

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2002

Released: April 17, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“Order”), we deny a petition for reconsideration filed on January 4, 2002, by Eure Family Limited Partnership (“Eure”). Eure seeks reconsideration of a *Forfeiture Order*¹ which issued a monetary forfeiture against Eure in the amount of \$8,000 for failure to exhibit red obstruction lighting on its Mathews County, Virginia antenna structure between sunset and sunrise in willful violation of Section 17.51(a) of the Commission’s Rules (“Rules”).²

II. BACKGROUND

2. Eure owns an antenna structure in Mathews County, Virginia, with antenna structure registration (“ASR”) number 1018162. The ASR for the Mathews County tower indicates that red obstruction lighting is required between sunset and sunrise. On June 8, 2001, a resident of Harfield, Virginia contacted the FCC and reported that he had observed the Mathews County tower without its top beacon lit at night. On June 9, 2001, after sunset, an FCC agent inspected the structure and observed that the top beacon was not lit. Another FCC agent then contacted the Federal Aviation Administration’s (“FAA”) Leesburg, Virginia Flight Service Station, which advised the agent that there was no Notice to Airmen (“NOTAM”)³ in effect for the Mathews County tower. At the FCC agent’s request, the FAA issued a NOTAM for the Mathews County tower.

¹ *Eure Family Limited Partnership*, 16 FCC Rcd 21302 (Enf. Bur. 2001).

² 47 C.F.R. § 17.51(a).

³ Tower owners are required to report any obstruction lighting outages to the nearest Flight Service Station or FAA office immediately if the outage is not corrected within 30 minutes. See 47 C.F.R. § 17.48(a). The FAA then issues a NOTAM, a written advisory to aircraft pilots regarding a hazard or potential hazard of which they should be aware. A NOTAM expires automatically after 15 days, unless the tower owner calls the FAA to extend the NOTAM.

3. On July 2, 2001, the Commission's Norfolk, Virginia Resident Agent Office ("Norfolk Office") issued a Notice of Violation ("NOV") to Eure⁴ for failing to exhibit red obstruction lighting on the Mathews County tower between sunset and sunrise in violation of Section 17.51(a) of the Rules. Eure filed a response to the NOV on July 20, 2001. In this response, Eure stated that it had operated the tower as an antenna site for WXEZ-FM, Yorktown, Virginia, and that it had monitored the tower lights using a telephone dial-up device that was programmed to notify WXEZ's engineer of any lighting outages until it sold WXEZ in October 2000. Eure further stated that by lease agreement dated January 5, 1999, it leased space on the Mathews County tower to Bullseye Broadcasting, LLC ("Bullseye"), licensee of WSRV, Deltaville, Virginia, and that the terms of the lease agreement required Bullseye to monitor the tower lights and notify Eure of any lighting failures. Eure provided a letter from a principal of Bullseye, who stated that Bullseye failed to notify Eure of the malfunctioning beacon because he was unaware that the lease agreement obligated Bullseye to monitor the tower lights. Bullseye's principal also stated that the dial-up device used to monitor the tower lighting was never reprogrammed to notify Bullseye's engineer of any lighting outages after Eure sold WXEZ in October 2000. Finally, Eure indicated that the malfunctioning beacon had been repaired and that the dial-up device had recently been reprogrammed to notify Bullseye's engineer of any lighting outages.

4. On August 16, 2001, the Norfolk Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") for a forfeiture in the amount of \$8,000 to Eure for failure to exhibit red obstruction lighting on the Mathews County tower between sunset and sunrise in violation of Section 17.51(a) of the Rules.⁵ The NAL noted that the base forfeiture amount for tower lighting violations is \$10,000,⁶ but reduced the forfeiture amount to \$8,000 based on Eure's history of compliance with the Commission's rules. Eure filed a response to the NAL on September 17, 2001. In this response, Eure did not dispute that the violation occurred, but argued that the violation was not willful because its contractor, Bullseye, failed to notify it of the extinguished beacon. In the *Forfeiture Order*, we rejected this argument, noting that the Commission has long held licensees and other Commission regulatees responsible for the acts and omissions of their employees and independent contractors.

III. DISCUSSION

5. In its petition for reconsideration, Eure argues that the *Forfeiture Order* should be vacated because the Bureau did not consider its explanation of the matter and because the *Forfeiture Order* is not supported by probative evidence of a "willful or repeated" violation. Specifically, Eure maintains that the Bureau failed to consider its explanation that the violation was inadvertent, not willful. Eure asserts that its conduct was not willful because it did not know that the beacon was extinguished. In this regard, Eure states that it had an agreement with a party whose duty it was to monitor the lights and

⁴ The Norfolk Office issued the NOV to Eure Communications, Inc. because FCC records incorrectly listed Eure Communications, Inc. as the owner of the Mathews County tower. The response to the NOV, which was signed by C. Wesley Eure on behalf of both Eure Communications, Inc. and Eure Family Limited Partnership, indicated that ownership of the tower had been transferred to Eure Family Limited Partnership. On August 8, 2001, the Norfolk Office confirmed that the FCC records had been updated to list Eure Family Limited Partnership as the owner of the Mathews County tower.

⁵ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200132640006 (Enf. Bur., Norfolk Office, released August 16, 2001).

⁶ See 47 C.F.R. § 1.80(b)(4).

the party failed to live up to the agreement. Eure further asserts that if it had known that the beacon was extinguished, it would have promptly repaired it, and that it did in fact repair the beacon when it learned of the outage.

6. We reject Eure's assertion that we failed to consider its explanation for the violation. The *Forfeiture Order* discussed Eure's explanation at great length. The fact that we disagreed with and rejected its explanation does not mean, as Eure contends, that we ignored its arguments and "mechanistically" issued the *Forfeiture Order*.

7. Moreover, we reject Eure's assertion that the violation was not willful because its contractor, Bullseye, failed to inform it that the beacon was extinguished. Eure does not deny that Bullseye's failure to maintain the lighting on the antenna structure was willful. Rather, Eure argues that nothing in the record demonstrates that Eure knew or should have known about the extinguished beacon and that it cannot be sanctioned for the actions of its contractor. We find Eure's argument wholly unpersuasive. That Bullseye may have failed to live up to its agreement with Eure is a private contractual matter between Eure and Bullseye and does not negate the violation in this case. As we explained in the *Forfeiture Order*, the Commission has consistently held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors under the doctrine of *respondeat superior*. See *MTD, Inc.*, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972); *SpectraSite Communications, Inc.*, 16 FCC Rcd 17668, 17669 (Enf. Bur. 2001); *Netcom Technologies, Inc.*, 16 FCC Rcd 9524, 9526 (Enf. Bur. 2001). Indeed, it is a basic tenet of agency law that the actions of an employee or contractor are imputed to the employer and "the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations." See *American Paging, Inc. of Virginia*, 12 FCC Rcd 10417, 10420 (Wireless Bur., Enf. and Cons. Inf. Div., 1997) (quoting *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1244 (1984) ("*Triad*"). Thus, it is irrelevant that the violation is attributable to Eure's contractor because Eure is liable for the willful acts and omissions of its contractor.⁷

8. Eure argues that *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) ("*Southern California*"), a case cited in the *Forfeiture Order*, is ten years old and easily distinguishable from the instant case. However, it is clear from a plain reading of the *Forfeiture Order* that we cited *Southern California* in support of the proposition that the definition of the term "willful" in Section 312(f)(1) of the Communications Act of 1934,⁸ as amended, ("Act") also applies to the term "willful" as used in Section 503(b) of the Act.⁹ Eure does not dispute this proposition. Therefore, it is immaterial that *Southern California* is ten years old or that it is factually dissimilar to the instant case.

9. Eure also attempts to distinguish three other cases which we cited in the *Forfeiture Order*. In each of these cases, the Commission reaffirms that a violation resulting from an inadvertent mistake is considered a willful violation. See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992) ("*PJB*"); *Standard Communications Corp.*, 1 FCC Rcd 358 (1986) ("*Standard*"); and *Triad*, 96

⁷ Because we conclude that Eure's violation is willful, we need not address its argument that the violation is not repeated.

⁸ 47 U.S.C. § 312(f)(1).

⁹ 47 U.S.C. § 503(b).

FCC 2d at 1242. Eure asserts that *PJB* is distinguishable because the licensee in that case “knew it was doing the act in question,” whereas Eure did not know that the beacon on its tower was extinguished, and because the violation in that case was repeated. In addition, Eure asserts that *Standard* and *Triad* are inapposite because the violations in those cases were repeated. We cited these three cases in the *Forfeiture Order* in support of our finding that Bullseye’s failure to maintain the lighting on the antenna structure was willful. Eure does not dispute this finding. Eure’s assertions concerning these cases appear to be premised on its belief that it is not responsible for the acts and omissions of its contractor, which, as discussed above, is erroneous.

10. Finally, Eure argues that the instant case is similar to *Vernon Broadcasting, Inc.*, 60 RR 2d 1275 (1986) (“*Vernon*”), where the Commission cancelled a forfeiture issued for failure to maintain adequate fencing around an AM tower in violation of Section 73.49 of the Rules¹⁰ after concluding that the violation was not willful. We disagree. In *Vernon*, the Commission determined that the violation was not willful because the evidence indicated that the licensee regularly monitored the antenna site. *Id.* By contrast, in the instant case, the record clearly shows that neither Eure nor its contractor monitored the antenna structure. In this regard, the record indicates that neither Eure nor Bullseye reprogrammed the telephone dial-up device used to monitor the tower lighting after Eure sold its FM station in October 2000 and Bullseye did not inspect the device even once between October 2000 and June 9, 2001 to ensure that it was functioning properly. It is also apparent from the record that Eure did nothing to supervise or monitor the activities of its contractor.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act,¹¹ and Section 1.106 of the Rules,¹² Eure Family Limited Partnership’s petition for reconsideration of the December 5, 2001, *Forfeiture Order* **IS DENIED** and the issuance of the \$8,000 forfeiture **IS AFFIRMED**.

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹³ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200132640006 and FRN 0005-0271-72. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁴

13. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested to Eure Family Limited Partnership, 4026 George Washington Hwy.,

¹⁰ 47 C.F.R. § 73.49.

¹¹ 47 U.S.C. § 405.

¹² 47 C.F.R. § 1.106.

¹³ 47 U.S.C. § 504(a).

¹⁴ See 47 C.F.R. § 1.1914.

Yorktown, Virginia 23692, and to its counsel, Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau